No. 15,523

United States Court of Appeals

For the Ninth Circuit

DANIEL L. ABDUL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

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STATEMENT OF JURISDICTION.

The United States District Court for the District of Hawaii, hereinafter referred to as the "Court", had jurisdiction to try the indictment (R. 3-15) returned against Appellant under the provisions of §3231, Title 18, U.S.C. This Court has jurisdiction of Appellant's appeal from his conviction on six counts of said indictment under the provision of §1291, Title 28, U.S.C.

STATEMENT OF THE CASE.

On March 16, 1956, an indictment in twelve counts was filed against Appellant in the District Court.

The odd numbered counts are misdemeanor charges. In Count I of the indictment Appellant is charged as follows:

> "That during the period from October 1, 1953, to December 31, 1953, inclusive, Daniel L. Abdul was the president and general manager of Home Furniture Company, Limited, a corporation employing labor, with its principal place of business in the City and County of Honolulu, and by reason of such facts he was required under the provisions of the Internal Revenue Code and was under a duty to make a return of Federal Income Taxes withheld from wages and Federal Insurance Contributions Act Taxes; that said Daniel L. Abdul, during said period paid wages to the employees of said corporation which were subject to withholding of Federal Income Taxes and Federal Insurance Contributions Act Taxes in the sum of $2,987.58; that by reason of such facts the said Daniel L. Abdul was required after December 31, 1953, and on or before January 31, 1954, to file with the Director of Internal Revenue for the District of Hawaii at Honolulu, City and County of Honolulu, Territory of Hawaii, in the District of Hawaii, an Employer's Quarterly Federal Tax Return; and that said Daniel L. Abdul, well knowing his duty and obligation to make such return, did wilfully and knowingly fail to make to said Director or to any other proper officer of the United States said Employer's Quarterly Federal Tax Return, in violation of Section 2707(b), Internal Revenue Code of 1939, 26 United States Code, Section 2707 (b)."

Similar charges are made against Appellant in Count III for the first quarter of 1954, in Count V for the

second quarter of 1954, in Count VII for the third quarter of 1954, in Count IX for the first quarter of 1955, and in Count XI for the second quarter of 1955.

The even numbered counts are felony charges. In Count II of the indictment Appellant is charged as follows:

> "That on or about the 31st day of January, 1954, in the District of Hawaii, Daniel L. Abdul, the identical person named in Count I of this Indictment, who was the president and general manager of Home Furniture Company, Limited, a corporation with its principal place of business in the City and County of Honolulu, and who as such was required under the provisions of the Internal Revenue Code and was under a duty to collect, account for and pay over Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages and who, during the 4th quarter of the year 1953 ending December 31, 1953, deducted and collected from the total taxable wages of the employees of said corporation such taxes in the sum of $2,987.58, did wilfully fail to truthfully account for and pay over to the Director of Internal Revenue for the District of Hawaii, or to any other proper officer of the United States, said Federal Insurance Contributions Act Taxes and Federal Income Taxes withheld from wages due and owing to the United States of America for said quarter ending December 31, 1953, in violation of Section 2707 (c), Internal Revenue Code of 1939, 26 United States Code, Section 2707 (c)."

Similar charges are made against Appellant in Count IV for the first quarter of 1954, in Count VI

for the second quarter of 1954, in Count VIII for the third quarter of 1954, in Count X for the first quarter of 1955, and in Count XII for the second quarter of 1955.

Counts I, III and V are laid under Section 2707 (b) of the Internal Revenue Code of 1939. Counts VII, IX and XI are laid under §7203 of the Internal Revenue Code of 1954 (26 U.S.C. §7203). Counts II, IV and VI are laid under §2707 (c) of the Internal Revenue Code of 1939. Counts VIII, X and XII are laid under §7202 of the Internal Revenue Code of 1954 (26 U.S.C. §7202).

Appellant pleaded not guilty to each count of the indictment on September 21, 1956 (R. 298). The case was tried before the Honorable Jon Wiig, District Judge, on November 26, 27, 28, 29, 30 and on December 3, 4, and 5, 1956 (R. 298-302). On December 5, 1956, the jury returned a verdict of guilty as to each of the odd numbered counts and not guilty as to each of the even numbered counts.

Appellant, who is a Hawaiian born married man with two children was the president and general manager of Home Furniture Company, Limited, a Hawaiian corporation, during the period covered by the Indictment (R. 58). It was in this capacity that he was charged in the indictment as stated above (R. 3-15). However, there is no conflict in the evidence that by February 10, 1956, or more than six months before the indictment was returned, Appellant had paid all taxes due and all penalties and interest assessed on such taxes for the six quarters which are

covered by the indictment (R. 182-184, 188-190). In fact, Mr. Stratton, one of the government's agents who worked on the collection of these taxes when asked the following question:

> "Q. And, as a matter of fact, Mr. Stratton, when the money had been counted up in the till of the Internal Revenue Service, it was found that he (Appellant) had overpaid by about $117 which was returned, is that correct?

stated, "I believe you are right on that, sir" (R. 184).

It was further sitpulated by the Government that the returns covered by the indictment were accurate as filed (R. 187). Mr. Watanabe, a witness called by the Government and formerly a bookkeeper for Appellant's corporation, testified that the returns were accurate (R. 121), and that information with reference to the tax liability of Appellant's corporation was always accurately available to representatives of the Internal Revenue Service in the books and records of the corporation (R. 121-122).

The return for the last quarter of 1953 (Counts I and II) was filed September 15, 1955, (Exhibit 2) and taxes, penalty and interest due thereon paid by February 3, 1956 (R. 188). The return for the first quarter of 1954 (Counts III and IV) was filed February 28, 1955 (Exhibit 4) and the taxes, penalty and interest due thereon paid by May 19, 1955 (R. 188). The return for the second quarter of 1954 (Counts V and VI) was filed February 28, 1955 (Exhibit 5) and the taxes, penalty and interest due thereon paid by January 30, 1956 (R. 189). The return for the

third quarter of 1954 (Counts VII and VIII) was filed February 28, 1955 (Exhibit 7) and the taxes, penalty and interest due thereon paid by May 1, 1955 (R. 189). The return for the first quarter of 1955 (Counts IX and X) was filed November 23, 1955 (Exhibit 9) and the taxes, penalty and interest due thereon paid by February 10, 1956 (R. 190). The return for the second quarter of 1955 (Counts XI and XII) was filed November 23, 1955 (Exhibit 10) and the taxes, penalty and interest due thereon paid by February 6, 1956 (R. 190).

Mr. Watanabe, testified that he prepared these returns prior to their respective due dates and that checks were also prepared to accompany the returns, but that Appellant did not file the returns or put through the checks because of insufficient funds (R. 80, 84, 111). The following questions and answers (R. 84) are a part of Mr. Watanabe's testimony:

> "Q. At the time you prepared those tax returns during the time that they were on his (Appellant's) desk or in that folder, was there money available to pay this?
>
> A. Well, our check record shows that they were overdrawn, heavily overdrawn.
>
> Q. On what occasion?
>
> A. On all occasions.
>
> Q. All the time?
>
> A. Just about all the time."

In fact, once check for $1,794.36 dated December 27, 1954, and put through in March, 1955, in payment of taxes due for the second quarter of 1954 was referred to maker because of insufficient funds (R. 111, Ex-

hibit 6). Mr. Watanabe further testified that although Appellant was paid a monthly salary of $1600.00, $800.00 of this was applied against his loan account with the corporation and that he sometimes was unable to cash his check for the remaining $800.00 and his wife was unable to cash her salary check because of insufficient funds (R. 131-132). Mr. Watanabe testified that he had instructed Appellant that the check should accompany the return (R. 132-133), though he also stated that on one occasion he told Appellant that if he didn't have the funds he should send in the returns (R. 133).

Reconciliation statements contained in Defendant's Exhibit H, the corporation ledger book, reflect the following month end deficit bank balances: December 31, 1953, $1,523.26, March 31, 1954, $12,671.35, June 30, 1954, $8,386.41, September 30, 1954, $6,790.02, December 31, 1954, $12,588.81.

Home Furniture Company, Ltd., was a retail furniture store which sold furniture on an installment contract basis and then discounted the contracts (R. 56, 80-82). Appellant testified that, "We only paid the things that we just absolutely had to pay in order to keep the doors open." (R. 195). With reference to the late filing and late payments and his stalling of agents of the Internal Revenue Service he stated (R. 196-197):

> "A. I knew that the returns had not been mailed, that I was trying to gain time in which to raise the cash to pay the taxes. At no time did I ever try not to pay it. I just didn't have the funds to pay it.

Q. And what were your reasons for continuously putting them off on appointments and asking to come back later?

A. Hoping to be able to find some source, raise the funds that we needed, have a sale, move a group of merchandise to get cash to be able to pay the taxes."

Appellant was also asked these questions and answered them as follows (R. 211):

"Q. And you knew that each one of those tax returns was due at the end of that month in question?

A. Yes, I do.

Q. And with that knowledge you didn't file them?

A. Only because we didn't have the money on hand to pay it with the report."

The Government called a Mr. Walker, formerly from Brooklyn it is believed, to the stand who testified that Appellant was pressing him to pay an overdue account, and that he (Walker) told Appellant he had tax obligations to "Uncle Sammy" which he had to pay first. He stated that Appellant replied: "I don't give a damn for Uncle Sammy. I come first and I will get my money before Uncle Sammy and I have ways of doing it." Appellant's motions to strike and for a mistrial were denied (R. 175-177).

On cross-examination of Appellant government counsel asked over objections, a number of questions concerning implied unethical business practices of Appellant which had nothing to do with his delinquent filing of tax returns and delinquent payment of the

taxes due thereon, ostensibly for impeachment purposes and to test his credibility. At no time did the Government ever offer evidence to rebut Appellant's denial of the unethical practices insinuated in the questions.

The major difficulty in connection with the settling of instructions was in the definition of the word "wilfully" as it appears in each count of the indictment. In substance, it was Appellant's position that the term requires proof of an evil motive or bad purpose as to both the felony and the misdemeanor counts. It was the Government's position that as to the misdemeanor counts the definition of "wilfully" was different from the felony counts; that if the failure to file or to pay the taxes due on time was done "without grounds for believing that one's act is lawful, or without reasonable cause, or capriciously or with careless disregard whether one has the right so to act," that then such failure was "wilful" whether evil motive or bad purpose was involved or not (R. 214-259). The District Court adopted the Government's view of the question (R. 269, 287-288, 290-291, 293-294). That this question seriously troubled the jury is shown by the fact that the jury returned on two occasions from its deliberations to ask that the instruction defining the term "wilfully" be repeated (R. 290-291, 293-294).

The case was submitted to the jury on December 5, 1956, and after it had been in their hands for approximately nine hours a verdict of guilty as to each of the odd-numbered (misdemeanor) counts was re-

turned as stated above (R. 302). On this conviction Appellant was sentenced to a total of 18 months imprisonment and to pay the costs of the prosecution (R. 303).

Appellant's motion for a new trial, raising substantially the same points raised on this appeal, was denied by the District Court (R. 27-29, 302-303). From said judgment Appellant duly perfected this appeal (R. 32-33, 303).

STATUTES INVOLVED.

§2707 (b) of the Internal Revenue Code of 1939, 53 Stat. 290, (Counts I, III and V):

> "Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

§7203, Internal Revenue Code of 1954, 26 U.S.C. §7203, 68A Stat. 851 (Counts VII, IX and XI):

> "Any person required under this title to pay any estimated tax or tax, or required by this title

or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

§2707 (c) of the Internal Revenue Code of 1939, 53 Stat. 290 (Counts II, IV and VI):

"Any person required under this subchapter to collect, account for and pay over any tax imposed by this subchapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony, and upon conviction thereof, be fined not more than $10,000 or imprisoned not more than five years, or both, together with the costs of prosecution."

§7202, Internal Revenue Code of 1954, 26 U.S.C. §7202, 68A Stat. 851 (Counts VIII, X and XII):

"Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law,

be guilty of a felony, and upon conviction therof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

§1627 of the Internal Revenue Code of 1939, 57 Stat. 126 (Withholding Taxes):

"All provisions of law, including penalties, applicable with respect to the tax imposed by section 1400 shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the tax under this subchapter."

§1430 of the Internal Revenue Code of 1939, 53 Stat. 178, amended Aug. 10, 1939, c. 666 Title IX, Sec. 903, 53 Stat. 1400:

"All provisions of law, including penalties, applicable with respect to any tax imposed by section 2700 or section 1800, and the provisions of section 3661, shall, insofar as applicable and not inconsistent with the provisions of this subchapter, be applicable with respect to the taxes imposed by this subchapter."

SPECIFICATION OF ERRORS.

1. *The Court erred in its instruction to the jury on the meaning of the term "wilfully" as used in the odd or misdemeanor counts of the indictment.* In this connection the Court first instructed the jury as follows (R. 269):

"Now, as to the other counts of the indictment, one, three, five, seven, eight [sic] and eleven, gen-

erally speaking, what I have just read to you is applicable with this limitation on the definition of the word 'wilful' in failing to make a tax return. In that connection it means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard of whether one has a right so to act."

Following objections made by Appellant's counsel the Court gave the following additional instruction to the jury (R. 287-288):

"Ladies and gentlemen of the jury, counsel for the defendant have called to my attention an oversight in my instructions concerning the definition of wilfulness or doing something wilfully which, as you know by now, is a very important element in this case. So I am going to supplement my instructions in this manner and perhaps it will clarify it for you. And this is a supplemental instruction. In other words, an addition, except for this repetition. The word 'wilful' as used in counts 1, 3, 5, 7, 9, and 11, that is, failing to make a tax return, means with a bad purpose *or* without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard whether one has the right so to act. With regard to the other counts 2, 4, 6, 8, 10 and 12, I supplement my instructions on the definition of wilful in the following language: An act is done wilfully if one voluntarily and purposely and with a specific intent to do that which the law forbids. Wilfulness implies a bad faith and an evil motive." (Emphasis supplied).

After deliberating for awhile the jury inquired further as to the meaning of "wilfulness" and the Court gave this instruction (R. 290-291):

> "The word 'wilful' as used in counts 1, 3, 5, 7, 9 and 11, that is, failing to make a tax return, means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act. The word 'wilful' as used in counts 2, 4, 6, 8, 10 and 12, that is, in failing to truthfully account for and pay over the taxes, means with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct. Further, *with respect to these counts,* wilfulness implies bad faith and an evil motive." (Emphasis supplied).

Later when the jury inquired further concerning this matter they were instructed that (R. 292):

> *"The types of wilfulness involved in these two different charges are separate and distinct and I ask you to pay particular attention to me when I describe to you what is meant in each instance.* The word 'wilful' as used in counts 1, 3, 5, 7, 9, and 11, that is, in failing to make a tax return, means with a bad purpose *or* without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act.
>
> The word 'wilful' as used in the remaining counts, that is, in failing to truthfully account for and pay over the taxes, means with knowledge of one's obligation to pay the taxes due and

with intent to defraud the Government of that tax by any affirmative conduct.

Further, with respect to *these counts,* wilfulness implies bad faith and an evil motive." (Emphasis supplied).

Appellant objected consistently to the definition of "wilfully" given by the Court as to the misdemeanor counts it being Appellant's expressed position that "wilfully" has the same meaning in both the felony and the misdemeanor counts and that an offense under the statutes here involved is not committed "wilfully" unless done with an evil motive or bad purpose. (R. 236-239, 283-286, 288-289, 292-293, 294).

With reference to the supplemental instruction given the jury as set out above Appellant objected (R. 292-293) to the Court's failure to give his suggested instruction No. 35 which had previously been given as follows (R. 274):

"You are instructed that if from the evidence you find that the defendant did not file tax returns at the time or times required by law or that he did not pay the tax required by law, such failures in themselves do not constitute wilfulness under the law. Unless you find that the filing and paying late of such taxes were acts with a bad purpose or an evil motive. If the Government proof goes no further than to establish a state of facts for [sic] which the inference of untruthfulness or wilfulness may not be reasonably drawn, then the Government has failed to establish the charges beyond a reasonable doubt. And under such circumstances it

would be the duty of the jury to acquit the defendant."

It is submitted further that the Court erred in refusing to give the following instructions requested by Appellant which relate to the subject of "wilfulness" (R. 17-19):

No. 37

"You are instructed that before you can find the Defendant guilty of the charges contained in the indictment, you must first find, from the evidence, that he was wilful. The wilfulness required in a criminal action must be established by evidence that shows affirmative or positive acts on the part of the Defendant, that, in and of themselves, spell out, specifically, bad purpose or evil motive. If you do not find such specific acts in the evidence, then you must return a verdict of 'Not Guilty'."

No. 38

"If you find that the filing of the returns and the payment of the taxes due were not delayed by Mr. Abdul with any bad purpose or evil motive on his part, then you must find him 'Not Guilty'."

No. 40

"If you find from the evidence that the Defendant did make all tax returns required of him, even though paid late, that he did keep accurate records; that he supplied the government agents with information requested even if delayed at times; that he did eventually pay the taxes due and that he truthfully accounted for his tax li-

ability, then the Defendant cannot have acted with bad purpose or evil motive, and if you so find from the evidence, then you must return a verdict of 'Not Guilty'."

No. 41

"If you find from the evidence that the defendant may have been impolite, crude, abrupt, trying or even irritating to any one or even all of the Internal Revenue Service employees and agents, none of these are evidence of bad purpose or of evil motive or of wilfulness on the part of the defendant."

No. 42

"If you find that it was the intention of Mr. Abdul to pay the taxes due when sufficient funds were available, then you must find him 'Not Guilty' of each and every count of the indictment."

No. 45

"If you find from the evidence that the Defendant did disclose his true tax liability, then this is evidence that the necessary criminal wilfulness on his part was not present, and you must find him not guilty."

No. 46

"Before you can find the Defendant guilty of wilfulness you must be certain that the evidence shows specific intent, that is, you must be able to point to the specific acts which constitute the acts of wilfulness; if you cannot do so, then you must find the Defendant 'Not Guilty'."

2. *The Court erred in giving the Government's requested instruction Number 22 to the jury.* This instruction was given as follows (R. 278):

> "The importance of your duties as jurors requires that you consider the right of the Government of the United States to have its laws properly executed, and that it is with you citizens selected from this district that finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty you might just as well strike the laws from the statute books."

Appellant duly noted his objections to the giving of this instruction (R. 252, 283).

3. *The Court erred in refusing to grant Appellant's motion to strike the testimony of Mr. Walker set out in haec verba, supra, p. 8, and in refusing Appellant's motion for a mistrial based on Walker's testimony* (R. 175-177). The Court further erred in refusing Appellant's requested instruction No. 48 providing as follows (R. 20):

> "You are instructed to disregard all of the testimony of the witness James or Jimmy Walker."

4. The Court erred in refusing (R. 227) to give Appellant's requested instruction No. 54 which reads as follows:

> "You are hereby instructed that all testimony relative to the merchandising and advertising techniques of the Defendant and that all testimony relative to specific sales by Home Furniture

Company, Limited, is irrelevant and shall be disregarded by you."

During the trial the prosecutor had asked repeated questions of Appellant implying that he engaged in unethical and dishonest business practices. Objections were made that these questions were immaterial and irrelevant (R. 198, 200, 202, 204, 205 and 206). The questions and objections are quoted in full herein below in the argument of this assignment. On the basis of the prosecutor's representation that they were designed to impeach the Appellant's credibility the Court overruled the objections even though the subject matter of the questions was entirely collateral (R. 202). However, the Government never offered any evidence to rebut Appellant's denial of the charges implied in the questions.

ARGUMENT.

I.

THE COURT ERRED IN INSTRUCTING THE JURY AS IT DID ON THE MEANING OF "WILFUL".

As noted above the Court in its instruction to the jury drew an emphatic distinction between the meaning of the term "wilfully" as used in the misdemeanor counts and as used in the felony counts. In substance the Court advised the jury that the conduct of Appellant must have been with evil motive or bad purpose (wilful) in order to find him guilty of the felony counts, but that mere negligence or "a careless dis-

regard of whether one has a right so to act" is sufficient to find him guilty of the misdemeanor counts. This distinction which Appellant submits was both erroneous and prejudicial was reemphasized each time the jury interrupted its deliberations to request additional instruction on the subject.

There are many federal cases in which the meaning of "wilfully", as used in §145 (b) of the Internal Revenue Code of 1939 as amended, is discussed and there are a few cases in which the meaning of "wilfully", as used in §145 (a) of the Internal Revenue Code of 1939 as amended, is commented upon. However, counsel for Appellant has found scant authority on the meaning of the term "wilfully" as used in §2707 (b) of the Internal Revenue Code of 1939, as amended, and in §7203, Title 26, U.S.C.

The two leading Supreme Court cases which touch on this subject are *United States v. Murdock,* 290 U. S. 389 (1933), and *Spies v. United States,* 317 U. S. 492 (1943). In the *Murdock* case the defendant was convicted of a violation of §1114 (a) of the Revenue Act of 1926, 44 Stat. 116, which provided that:

> "Any person required under this Act to pay any tax, as required by law or regulation made under authority thereof to make a return, keep any records, or supply any information, for the purpose of the computation, assessment, or collection of any tax imposed by this Act, who *wilfully* fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, . . ." (Emphasis supplied).

was guilty of a misdemeanor. The similarity of §1114 (a) of the 1926 Act with §2707 (b) of the 1939 Act and §7203 of the 1954 Act is readily apparent. Murdock had refused to answer questions of a revenue agent, after having been duly summoned, on the ground of self-incrimination, claiming that he feared prosecution under state statutes. His conviction was reversed by the Court of Appeals (7th Cir., 62 F. 2d 926), and the Government appealed to the Supreme Court which affirmed the Circuit Court's decision.

The trial judge had refused defendant's request for an instruction that whether the defendant's refusal was based on actual belief and made in good faith should be considered in determining whether his conduct was wilful. The trial judge in his instruction to the jury had stated that the government had proved the "defendant is guilty in manner and form as charged beyond a reasonable doubt."

In its decision the Supreme Court acknowledges that in certain cases such an instruction would not warrant reversal, but went on to say at page 394 that:

> "The present, however, is not such a case, unless the word 'wilfully,' used in the sections upon which the indictment was founded, means no more than voluntarily.
>
> "The word often denotes an act which is intentional, or knowing or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose [citations]; without justifiable excuse [citations]; stubbornly, obstinately, perversely [citations]. The word is also employed

to characterize a thing done without ground for believing it is lawful [citations], or conduct marked by a careless disregard whether or not one has the right so to act, [citation]."

The Supreme Court further noted that:

"This court has held that where directions as to the method of conducting a business are embodied in a revenue act to prevent the loss of taxes, and the act declares a wilful failure to observe the direction a penal offense, an evil motive is a constituent element of the crime.

* * *

"It follows that the respondent (Murdock) was entitled to the charge he requested with respect to his good faith and actual belief."

The closing comment of the Supreme Court in the *Murdock* case is particularly applicable to the instant case:

"The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

On the other hand, in the *Spies* case, *supra,* the defendant had been charged under §145 (b) of the Internal Revenue Code of 1939, as amended, with wilfully attempting to defeat and evade the payment of taxes, a felony. The Court in discussing the distinction between the misdemeanor (§145 (a)) and the felony (§145 (b)) stated at page 497:

"The difference between willful failure to pay a tax when due, which is made a misdemeanor,

and a willful attempt to defeat and evade one, which is made a felony, is not easy to detect or define. *Both must be willful,* and willful, as we have said, is a word of many meanings, its construction often being influenced by its context. *United States v. Murdock,* 290 U.S. 389. It *may* well mean something more as applied to nonpayment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return *might* meet the test of willfulness. But in view of our traditional aversion to imprisonment for debt we could not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been willful failure to disclose the liability is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer." (Emphasis supplied).

However, the Court rejected its "may" and "might" definitions of wilful, pointing out that §145 (a) made both wilful failure to file a return and wilful failure to pay the tax a misdemeanor. Accordingly, it concluded that the difference between the misdemeanor and the felony does not lie in a difference in the meaning of term "wilful" as used in one and in the meaning of the term "wilful" as used in the other, but rather "is found in the affirmative action implied from the term 'attempt', as used in the felony subsection." *Ergo,* to have wilfulness you must also

have evil motive or bad purpose. The Court noted at page 500 that Spies had claimed he had other "motives", but the Court held that such inferences are for the jury.

In the instant case the Court by its instruction did not require the jury to find that Appellant had an evil motive or bad purpose to find him guilty of the misdemeanor counts. In fact the Court emphasized that this was necessary by repeatedly drawing a distinction between the felony and misdemeanor counts and instructing that an evil motive and bad purpose must be found to convict Appellant of the felony charges. Much of the testimony which Appellant caused to be printed and which is referred to in the Statement of Facts above reflects that an issue as to the *bona fides* of Appellant's delinquencies should have been submitted to the jury. The books were accurate and available (R. 121-122); the returns were accurate (R. 121, 187); his reasons for not filing and paying on time were due to a shortage of funds (R. 80, 84, 111, 196-197, 210, 211); he believed that payment had to be made at the same time as the return was filed (R. 132-133, 210, 211). It matters not that there may be other evidence which was not printed from which the jury could have inferred that Appellant had the requisite evil motive or bad purpose; the fact is, that an issue of good faith was raised and Appellant was entitled to have it submitted to the jury by appropriate instructions such as Defendant's Requested Instructions quoted above, pp. 16-17. However, the Court's failure to instruct that

evil motive or bad purpose are a required element of the misdemeanors charged resulted in this issue never getting to the jury. It is significant that in connection with the felony counts where "wilfully" was correctly defined by the Court the jury acquitted.

This Court and many others have repeatedly held that "wilfully", as used in tax statutes, declaring certain acts or omissions to be crimes, means with evil motive or bad purpose, and that the failure to give a proper instruction defining the term is reversible error. *Bloch v. United States,* 9th Cir., 1955, 221 F. 2d 786, 789, rehearing den. 223 F. 2d 297 (violation of §145 (b) of the Internal Revenue Code of 1939, as amended); *Forster v. United States,* 9th Cir., 1956, 237 F. 2d 617 (§145 (b)); *United States v. Phillips,* 7th Cir., 1955, 217 F. 2d 435, 442 (§145 (b)); *Wardlaw v. United States,* 5th Cir., 1953, 203 F. 2d 884 (§145 (b)); *United States v. Raub,* 7th Cir., 1949, 177 F. 2d 312 (§145 (b)); *Hargrove v. United States,* 5th Cir., 1933, 67 F. 2d 820, 823 (4 counts, §1114 (a), misdemeanor, and §1114 (b), felony, of the Revenue Act of 1926); *Haigler v. United States,* 10th Cir., 1949, 172 F. 2d 986 (§145 (b)). A few cases, holding that to convict a finding of evil motive or bad purpose is required, are cited: *Legatos v. United States,* 9th Cir., 1955, 222 F. 2d 678 (§145 (b)); *Imholte v. United States,* 8th Cir., 1955, 226 F. 2d 585, 590, 591 (§145 (b)); *Batjes v. United States,* 6th Cir., 1949, 172 F. 2d 1, 4 (§145 (b)); compare *Yarborough v. United States,* 4th Cir., 1956, 230 F. 2d 56, cert. den. 351 U. S. 969 (§2707 (b)).

In *Forster v. United States, supra,* this Court was critical of the fact that the lower Court gave isolated instructions on "wilfulness" during the jury's deliberation which did not clearly require a finding of evil motive or bad purpose to convict. It is to be noted that this was done in the instant case (R. 287-288, 290-291, 292, 293-294) and that the wording of the isolated instructions on "wilfulness" in both the *Forster* case and the instant case was quite similar

Another instruction which was given by the District Court (R. 267-268) and which has been found repugnant to a correct presentation of the issue of wilfulness to the jury is the following:

> "A person is held to intend all the natural and probable consequences of acts knowingly done or omitted. That is to say the law assumes a person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done or omitted."

Bloch v. United States, supra; Legatos v. United States, supra, at p. 687; *Wardlaw v. United States, supra* at p. 887. While it is true that the District Court apparently intended this instruction on "presumed intent" to relate only to the felony counts, it is obvious how confusing to the jury and prejudicial to the Appellant the instruction was when considered in the light of the further instruction on intent (R. 269-270) directly following the instruction on "wilfulness" as applied to the misdemeanor counts.

It would appear clear that although the term "wilful" may have different meanings in different contexts that it has a special and technical meaning when used in tax statutes which make certain acts or omissions criminal, to wit: it means that the act is done with evil motive and bad purpose. *Murdock v. United States, supra.* As a matter of statutory construction it is to be assumed that Congress used the term in both felony and misdemeanor Sections with a full realization of its legal meaning as enunciated in the cases cited above. Sutherland, *Statutory Construction,* §4919. It is further to be assumed that Congress did not intend that the same term ("wilfully") used in two consecutive sections of the same act (Section 7202 and 7203) and dealing generally with same subject matter (tax offenses) should have two different meanings. Further support for this proposition is to be found in *Paddock v. Siemoneit,* Tex., 1953, 218 S. W. 2d 428, 7 A.L.R. 2d 1062, 1071. In that case the Court held that "wilfulness" as used in tax statutes imposing criminal penalties required proof of evil motive or bad purpose, but that "wilfulness" as used in tax statutes imposing civil penalties requires only proof of a deliberate intentional failure to pay taxes when due.

II.

THE COURT ERRED IN GIVING GOVERNMENT'S REQUESTED INSTRUCTION NUMBER 22 TO THE JURY.

Immediately following an instruction that the prior assessment and payment of the taxes due was no

defense (R. 278) the Court instructed the jury as follows:

> "The importance of your duties as jurors requires that you consider the right of the Government of the United States to have its laws properly executed, and that it is with you citizens selected from this district that finally rests the duty of determining the guilt or innocence of those accused of crime, and unless you do your duty you might just as well strike the laws from the statute books."

Objection was made to the giving of this instruction on the ground that it constituted improper comment rather than being a correct statement of the law (R. 252, 283). This instruction clearly constituted an invasion of the province of the jury and was an invitation, if not a direction, to convict. There can be no question that it was coercive and prejudicial to Appellant and that it was an error. *Billeci v. United States,* U.S.C.A.D.C., 1950, 184 F. 2d 394, 399, 401, 24 A.L.R. 2d 881; *United States v. Link,* 3d Cir., 1952, 202 F. 2d 592.

III.

THE COURT ERRED IN REFUSING TO STRIKE THE WITNESS WALKER'S TESTIMONY.

On its case in chief the Government called Mr. James Walker as a witness. He testified that Appellant was trying to collect a debt which he owed him, and that he told Appellant that he was not in a position to pay, that he was still heavily indebted to

"Uncle Sammy". He further testified that Appellant replied (R. 176):

> "I don't give a damn for Uncle Sammy. I come first and I will get my money before Uncle Sammy and I have ways of doing it."

Appellant moved to strike on the grounds it was immaterial and irrelevant (R. 177). When this motion was denied Appellant moved for a mistrial, and this motion was also denied.

It is respectfully submitted that this testimony was completely immaterial and irrelevant to any issue raised in the indictment. An attempt by a creditor to secure payment from his debtor before some other creditor beats him to it has no relationship to the charges of failing to file returns on time or failing to pay taxes when due. Likewise, an expression of disregard for somebody else's debtor relationship to the United States is not pertinent. On the other hand evidence relating to such disregard of Walker's debtor relationship to the United States was highly prejudicial.

Immaterial and irrelevant testimony admitted over objection of Appellant and which may have a tendency to mislead the jury and prejudice the other party is sufficient ground for reversal. *Exchange Bank of Wilcox v. Gifford,* Neb., 1918, 167 N.W. 69.

IV.

THE COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO CERTAIN QUESTIONS ASKED BY THE PROSECUTOR AND IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 54.

Mr. Crumpacker, the prosecutor, asked many questions of Appellant in which it was insinuated that he engaged in unethical and improper business practices (R. 198-206). The prosecutor represented that he was seeking to impeach the defendant, but the Government never offered any evidence to rebut the Appellant's denial of the insinuations contained in the questions. There follow portions of the Record covered by this assignment of error (R. 198-206):

> "Q. Now, let me ask you, isn't it true that in your dealings, not only with the Bishop Bank but also with these other people that you dealt with, one of the methods that you were using to make sales was to take, for example a four hundred dollar bedroom set, and tell the customer—say a customer comes in and he says he can't make a down payment, and you say that is all right, we will just mark it up four hundred, fifty dollars and give you credit for fifty dollars down payment and then you discount the paper with the bank at the amount of four hundred dollars, which is exactly the price that your furniture was marked at in the first place. Isn't that the type of practice you were doing?
>
> Mr. Hoddick: Your Honor, we will object to the question as being immaterial and irrelevant to any issue in this case. And it is outside the scope of the direct examination.
>
> The Court. The objection is overruled.
>
> * * *

Q. Do you remember Mr. and Mrs. Nicholas Aguinoy? Let me refer you to December of 1954. Do you recall selling a tricycle and two toy autos to Mr. and Mrs. Aguinoy for $66.75?

Mr. Hoddick. Your Honor, we object to the question as being immaterial and irrelevant to any issue in the case. It is improper and I fail to see what the method of doing business with some of his customers has to do with this case.

The Court. If that is a real ground of your objection, then it is overruled, Mr. Hoddick.

* * *

Q. What do you know was the excise tax item which I believe is shown in the original taxes in your file in connection with the third quarter—the fourth quarter of 1953? I believe there were shown in your books an excise tax item of some $170.00. What, if you know, did that have to do with it?

Mr. Hoddick. Your Honor, I object to that as being immaterial and irrelevant and outside of the scope of the direct examination. It concerns a withholding [sic*] tax.

The Court. Is this for the purpose of showing a state of mind, Mr. Crumpacker?

Mr. Crumpacker. Yes, your Honor, for impeachment purposes.

The Court. The objection is overruled.

* * *

Q. It is true, Mr. Abdul, that you received numerous complaints about the method of advertising that you used at Home Furniture Company?

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*Should be "excise".

Mr. Hoddick. I am going to object to that as immaterial and irrelevant.

The Court. The objection is overruled.

* * *

Q. It is true, is it not, that you made use of matter which came from nationally advertised goods, blocking out the nationally advertised names, and using those to advertise goods of an inferior quality?

Mr. Hoddick. We renew our objection as irrelevant and immaterial.

The Court. The objection is overruled."

There are other questions of a similar vein interspersed among the questions quoted above to which no objections were made since inquiry into the collateral and unrelated matters covered by them had already been sanctioned by the Court. No evidence was ever offered by the Government to rebut the answers given by Appellant to this line of questions.

Again, in an attempt to prevent a beclouding of the issues by these collateral matters Appellant requested that the following instruction (R. 20, No. 54) be given:

> "You are hereby instructed that all testimony relative to merchandising and advertising techniques of the Defendant and that all testimony relative to specific sales by Home Furniture Company, Limited, is irrelevant and shall be disregarded by you."

This requested instruction was refused (R. 227).

It is submitted that there can be no question that the questions complained of in this assignment re-

lated to collateral matters which were not a proper subject of inquiry and that the implications or insinuations contained in the questions were prejudicial to Appellant. This Court has held that this technique of prosecuting a criminal case is error. *Herzog v. United States,* 9th Cir., 1955, 226 F. 2d 561, opinion adhered to 235 F. 2d 664, cert. den. 352 U.S. 844; *Bloch v. United States,* 9th Cir., 1955, 221 F. 2d 786, 790, rehearing den. 223 F. 2d 297; *Wigmore on Evidence,* 3d ed., §§781, 983 and 1808.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the judgment appealed from herein should be reversed.

Dated, Honolulu, T. H.,
October 12, 1957.

HOWARD K. HODDICK,
Attorney for Appellant.